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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALEXANDRA FISHER, ET AL.,
Appellants,

v.

CITY OF BERKELEY, ET AL.,
Respondents.

On Appeal from the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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Pursuant to Rule 36 of the Rules of the Court, amicus curiae Chamber of Commerce seeks leave to file the attached brief amicus curiae in support of the plaintiffs and appellants, Alexandra Fisher, et al.

The California Chamber of Commerce is a voluntary, non-profit business association with more than 4,800 members from virtually every industry and geographic section in the state of California. The Chamber's membership also includes 150 trade associations and it is closely affiliated with 387 local and regional chambers of commerce and more than 167,000 small businesses. The Chamber estimates that its members and affiliated local chambers employ 75 percent of the private work force in California. The issues presented in this case drastically impact upon commercial industries throughout the state and

local region and are of vital importance to the Chamber and its members and affiliated chambers. The test drafted by the court below not only permits municipalities to control rent but also gives them license to regulate nearly every aspect of the economy in the name of health, safety, and welfare, regardless of the impact on more overriding state and national goals. If this ill-conceived test, which departs significantly from the precedent established by this Court, is allowed to stand, businessmen throughout the state of California will fall by the sword of local governments whose only concern is to serve their own parochial interests, oblivious to the concerns of national economic policy. For these reasons, amicus California Chamber of Commerce is deeply concerned over the outcome of this case, and is submitting this brief to assist this Court in its consideration of the matter.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, the California Chamber of Commerce submits this brief amicus curiae in support of plaintiffs and appellants, Alexandra Fisher, et al. A motion has been attached pursuant to 36.1 requesting leave to file this brief in the absence of consent of the parties.

Amicus curiae California Chamber of Commerce ("The Chamber") is a voluntary, non-profit, California-wide business association, with more than 4,800 members from virtually every industry and geographic section in the state. Ninety percent of the members are small or medium-size businesses. The Chamber's membership also includes 150 trade associations, and it is affiliated with and regularly communicates on current business

issues with 387 local and regional chambers of commerce and more than 167,000 small business. The Chamber estimates that its members and affiliated local chambers employ 75 percent of the private sector work force in California.

The Chamber, on behalf of its members and affiliates, is vitally interested in the issues involved in this case. Rent control ordinances, such as the one enacted by the city of Berkeley, substantially impact upon commerce throughout the state of California and the western region of the United States. The economic harm inflicted by these anticompetitive activities can be felt not only in the residential housing industry but also in almost ever commercial industry throughout the state. Businessmen throughout California feel that this type of municipal regulation, enacted to further the purely parochial interests of the municipality and not pursuant to a clearly articulated and expressed state policy to displace competition with regulation, severely disrupts the state and national free-market goals. The Chamber, therefore, respectfully urges the Court to note probable jurisdiction.

INTRODUCTION AND SUMMARY OF ARGUMENT

The clear intent of Congress and the rule repeated by this Court in several recent decisions is that local governments are subject to scrutiny under the antitrust laws unless the municipal action constitutes the "implementation of clearly articulated and affirmatively expressed state policy" to "displace competition with regulation or monopoly public service." Consequently, anticompetitive ordinances enacted to further the parochial interests of the municipality, which conflict with federal antitrust laws, will be preempted by the Sherman Act under the Supremacy Clause of the United States Constitution. The rent control ordinance imposed upon private landlords by the city of Berkeley constitutes price-fixing in its purest form. Maximum as well as minimum price-fixing has long been held as a *per se* violation of the Sherman Act. That price-fixing is an "unreasonable or unlawful" restraint of trade and, as such, is *per se* invalid under the Sherman Act "without the necessity of minute inquiry" is well settled. Any municipal ordinance that contemplates such anticompetitive conduct "stands as an

obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and should be preempted by federal law.

The California Supreme Court in *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129 (1976), acknowledged "the conceded absence of any state statute authorizing local legislation on the subject." In fact, the Court expressly stated that "California has no rent control statute." *Id.* at 141. Therefore, the rent control ordinance enacted by the city of Berkeley is not beyond the intended scope of the federal antitrust laws and is preempted under the Supremacy Clause.

Moreover, the nexus between the rent control ordinance and interstate commerce, as a matter of practical economics, is sufficient to invoke federal jurisdiction under the Sherman Act. Most economists and commentators agree that maximum rent ceilings cause serious economic dislocation, including the retardation in the volume of rental housing sales and production. This retardation, in turn, affects the demand for financing and title insurance as well as the commercial industries involved with housing construction. In *McLain v. Real Estate Bd.,* 444 U.S. 232 (1980), this Court found a similar interstate effect sufficient to satisfy jurisdictional requirements under Sherman.

Finally, amicus curiae California Chamber of Commerce urges this Court to give plenary consideration to this case because of the threat posed by the ill-grounded and overly broad test created by the court below to determine the applicability of the Sherman Act to anticompetitive municipal regulation. Chamber members are confused by the California Supreme Court decision, which departs significantly from precedent firmly established by this Court in earlier case law. Consequently, businessmen throughout California fear that the court below has given municipalities "carte blanche" to enact any type of anticompetitive regulation that conceivably can be justified in the name of health, safety, and welfare, regardless of more overriding state and federal goals. On the other hand, they also are reluctant to participate with municipalities as beneficiaries of their anticompetitive regulation because of the uncertainty created by the decision below. Because this case

comes before the Court on appeal under 28 U.S.C. 1257(2), any summary disposition by this Court will be treated as one on the merits and accordingly will be afforded *stare decisis* effect by lower state and federal courts. *See Hicks v. Miranda,* 422 U.S. 332 (1975). In light of the devastating effect that this would have on established federal antitrust law, we respectfully urge this Court to consider this important case on the merits.

ARGUMENT

I

PRICE-FIXING REGULATION OF RESIDENTIAL RENTS BY LOCAL GOVERNMENT VIOLATES THE SHERMAN ACT AND IS PREEMPTED UNDER THE SUPREMACY CLAUSE IN THE ABSENCE OF EXPRESS STATE OR FEDERAL AUTHORIZATION

A. Federal Restraints on Local Police Power

The plenary power of Congress to regulate commerce under the Commerce Clause of the United States Constitution (Art. I, Sec. 8, cl. 3) imposes a preemptive limitation upon the exercise of police power by state and local governments. Congress' most expansive exercise of the Commerce Clause to date is the Sherman Antitrust Act (15 U.S.C. sec. 1 et seq.) In *California Retail Liquor Dealers Assn. v. Midcal Aluminum,* 445 U.S. 97 (1980), this Court emphasized the weight of the federal procompetitive policy:

> The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.
>
> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). [445 U.S. at 110-111.]

By enacting the Sherman Act, Congress "sought to establish a regime of competition as the fundamental principal governing commerce in this country." *Lafayette v. Louisiana Power & Light Company,* 435 U.S. 389, 398 (1978). The importance of this "natural regime of competition" requires that local governmental bodies be subjected to and controlled by the guiding force of the Sherman Act.

B. Preemption by the Sherman Act Under the Supremacy Clause.

Local law is preempted by federal law if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97, a case involving a statute that required members of the California wine industry to file fair trade contracts or price schedules with the state, this Court held that the statute facially conflicted with the Sherman Act because it mandated resale price maintenance, an activity that has traditionally constituted a *per se* violation of the Sherman Act. *Id.* at 102-103.

The conduct contemplated by the Berkeley rent control ordinance constitutes price-fixing. Price-fixing schemes, through which intercessionary forces displace supply and demand and the judgment of independent traders in the determination of prices, are traditional and vulnerable targets of antitrust scrutiny. Price-fixing is prohibited as a *per se* violation of Sherman, *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911), and it is immaterial whether the effort is to fix minimum or maximum prices; *Albrecht v. The Herald Company,* 390 U.S. 145, 152-153 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 213 (1951). Moreover, price-fixing is prohibited whether prices are fixed by the sellers or by some third party. *Simpson v. Union Oil Co.,* 377 U.S. 13 (1964); *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384 (1951). As this Court summarized in *U.S. v. McKesson & Robbins, Inc.,* 351 U.S. 305 (1956), in a price-fixing case it makes no difference whether the motives are good or evil, what means are employed, whether the amount of

commerce affected is small or large, or whether the effect of the price manipulation is to increase or to decrease prices. Fiddling with market prices is simply prohibited, and it is a *per se* violation of the Sherman Act.

The city of Berkeley's Measure D is preempted by the Sherman Act because it clearly "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). This Court has repeatedly stated that these policies are the preservation of free enterprise and open competition. *See, e.g., United States v. Topco Associates, Inc.,* 405 U.S. 596, 610 (1972); *California Retail Liquor Dealers Assn. v. Midcal Aluminum,* 445 U.S. 97, 110-111 (1980). By prohibiting upward price competition, rent control has the direct effect of "elimination of one form of competition." *United States v. Trenton Potteries Co.,* 273 U.S. 392, 397 (1927). The fact that Berkeley's rent control ordinance fixes a ceiling rather than a floor on rental housing is irrelevant; this Court has held that maximum price-fixing is as deleterious to competition as minimum price-fixing. *Albrecht v. The Herald Company,* 390 U.S. 145, 152-153 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, 213 (1951). This type of price-fixing arrangement, in the abstract, creates the "potential power" to eliminate competition in the rental housing market. It is, in itself, an "unreasonable or unlawful" restraint, and, as such, is *per se* invalid, "without the necessity of minute inquiry." *See Trenton Potteries, supra,* 273 U.S. at 397. Therefore, because the rent control ordinance enacted by the city of Berkeley contemplates price-fixing, which is a *per se* violation of the federal antitrust laws, the ordinance is condemned under section 1 of the Sherman Act.

C. The Effect of the Rent Control Ordinance on Interstate Commerce is Not Insubstantial.

The broad authority of Congress to regulate under the Commerce Clause has been interpreted to extend beyond activities that are "in commerce" to include wholly interstate activities that have a substantial "effect on commerce." *McLain v. Real Estate Bd.,* 444 U.S. 232, 241 (1980).

Federal jurisdiction under the Sherman Act may be established by a showing that the allegedly anticompetitive conduct contemplated by the rent control ordinance has, "as a matter of practical economics," a not insubstantial effect on the interstate commerce involved. *McLain,* 444 U.S. at 246.

Phillip Areeda, interpreting the *McLain* decision, stated:

> [T]he court [elsewhere] made clear that there must be a nexus, at least "as a matter of practical economics" between the challenged conduct and interstate commerce. Thus, *McLain* seems to mean that although the plaintiff need not make a "particularized showing" of an actual interstate effect caused by the challenged conduct, he must show that it would inherently tend, as a matter of practical economics, to have an interstate effect. [P. Areeda, *Antitrust Law,* paragraph 232-1c (Supp. 1982).]

In *McLain,* a case in which the real estate brokers in the New Orleans area allegedly agreed to fix brokerage commissions through fixed rates, engaged in fee-splitting and suppression of market information useful to buyers and sellers, this Court found federal jurisdiction based upon the effect of the alleged brokerage activities on interstate commerce. (*Id.* at 242.)

Following an approach of "practical economics," as suggested by *McLain,* a not insubstantial effect upon interstate commerce clearly can be established in this case based upon the nexus between the rent control ordinance enacted by the city of Berkeley and interstate commerce. In fact, a striking similarity exists between the interstate effect of brokerage services in *McLain* and the effect on interstate commerce when a municipality imposes an artificial ceiling on rents charged by private landlords. Justice Lucas correctly noted in his dissent below that "[e]conomists are virtually unanimous in their condemnation of rent control laws." Opinion below, 37 Cal.3d 644, 715-716 (1984) (citing, *e.g.,* Baird, *Rent Control: the Perennial Folly* pp. 54-78; *Rent Control, A Popular Paradox* (The Fraser Institute edition 1975) [essays by nine economists]; Muth,

Redistribution of Income Through Regulation in Housing, 32 Emory L.J. 691, 698 (1983)). He points out that most economists take the view that rent control schemes cause what the Court has called "serious economic dislocation." Opinion below, 37 Cal.3d at 716 (citing *Lafayette,* 435 U.S. at 412-413). He quotes, as example, the following observation made by Professors Milton Friedman and George Stigler:

> Rent ceilings, therefore, cause haphazard and arbitrary allocation of space, inefficient use of space, *retardation of new construction* and indefinite continu nce of rent ceilings, or subsidisation of new construction and a future depression in residential building. [Opinion below, 37 Cal.3d at 716 (Lucas, J., dissenting) (citing Friedman and Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, A Popular Paradox,* p. 100 (The Fraser Institute edition (1975)).]

Most economists and commentators agree that maximum rent ceilings have a negative impact on the production of new rental housing. *See,* e.g., Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws,* 69 Cornell L.Rev. 604, 609-610 (1984) (concluding that in the long run, rent control will have a chilling effect on investors, curtailing the supply of housing); Siegan, *Commentary on Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 721, 723 (1983) (asserting that the most harmful economic effect of rent control is manifested by its impact on housing production); Urban Land Institute, ULI Research Report #24, *Prospects of Rental Housing Production Under Rent Control: A Case Study of Washington, D.C.,* at 15 (1976) (concluding that "because housing investors are as much concerned about the propensity for future intervention affecting the economics of property operation as with current regulations," no significant amount of new rental housing will be produced until the rent controls are lifted). Artificially-created barriers to the production of new rental housing has an even more substantial effect upon interstate commerce than the fixing of brokerage fees. In discussing the effect of brokerage

activities on the frequency and terms of residential sales transactions, the *McLain* Court stated that "whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance." *McLain,* 444 U.S. at 246. These two commercial activities were shown in *McLain* to have occurred in interstate commerce. *Id.*

A retardation in the production of new rental housing, caused by the rent control ordinance, directly affects the demand for financing and title insurance. Just as in McLain, funds for financing the production of new rental housing in Berkeley are raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions take mortgages insured under federal programs which necessitate the interstate transfer of premiums and settlements. Moreover, mortgage obligations are physically and constructively traded as financial instruments in the interstate secondary mortgage market. In addition, lending institutions in California usually require title insurance before making a mortgage loan. This title insurance is often furnished by interstate corporations.

According to an analysis by the Construction Industry Research Board,[1] 38,513 fewer rental housing units were built in California in 1983 as compared to 1978. This represented a loss of $1.7 billion in construction and 47,300 fewer jobs in construction employment. Moreover, this decrease in rental housing production resulted in 69,500 fewer non-construction jobs in California and 34,200 fewer jobs outside of the state.

A publication by the Bay Area Council of San Francisco entitled, *Rental Housing in California: Obstacles and Opportunities* (April 6, 1983) revealed the following:

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[1] Figures compiled and integrated in Spring 1984 by Construction Industry Research Board, a nonprofit industry research institute, through the application of U.S. Department of Commerce Bureau of Economic Analysis "input-output" models, developed to identify interstate commerce relationships, to building permit statistics provided by the Department of Commerce Bureau of Census. These figures were submitted to the state Supreme Court by letter brief of amicus California Building Industry Association on May 1, 1984.

> The summary of results stated, "rent control is a major barrier to investment in rental housing development projects in California—even in communities without rent control ordinances."
>
> Of the mortgage lenders surveyed, 82% agreed that "rent control is a threat to any new multifamily project in California, no matter where it is located . . ." [*See* Appendix H, A-147-148.]

The report continued by stating that rent control was by far the most frequently named disincentive for multifamily lending in California. Clearly, rent control "affects the demand for financing and title insurance" both in and out of the State of California. *See McLain,* 444 U.S. 246.

Moreover, a reduction in new rental housing production will substantially impact on the interstate flow of goods and services that relate directly to the construction industry. The Construction Industry Research Board report clearly illustrates that a reduction in rental housing production, caused by a rent control ordinance, can directly result in the loss of thousands of non-construction jobs outside of the state. The economic impact of these losses will in turn be felt in each of these respective states. In essence, Berkeley's rent control ordinance will have a trickling effect upon commerce throughout the state of California and the western region of the Country. In sum, "as a matter of practical economics," the rent control ordinance enacted by the city of Berkeley has an effect upon interstate commerce that is not insubstantial; therefore, federal jurisdiction under the Sherman Act may be firmly established.

D. The Rent Control Ordinance is Not Saved from Sherman Preemption Under the Doctrine of *Parker v. Brown.*

The Sherman Act neither expressly includes nor expressly excludes governmental activity from its anticompetitive prohibitions. Confronted with contentions that the Sherman Act forbade market interference by a state, this Court in *Parker v. Brown* 317 U.S. 343 (1943), cleared up this ambiguity by holding:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress. [*Id.* at 350-351.]

While the *Parker* doctrine is commonly referred to as establishing state action "immunity," its holding is that state anticompetitive activity which conflicts with Sherman was not intended to fit within the congressionally intended scope of federal antitrust laws. *See Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.,* 753 F.2d 790, 792 n. 1 (9th Cir. 1985).

Only in the past five years has the Court clarified the limitations upon this immunity, limitations which actually appear in seminal *Parker v. Brown* language. That language declares an immunity for activities of a *state* or its officers or agents when "directed by its *legislature,*" because in a "dual system of government" the *states* are sovereign" and the Court is reluctant to infer an intent to "nullify a *state's* control over its officers and agents." It is now well settled that the "state action immunity" only attaches to activity specifically directed by state law involving some degree of state control or supervision and that the Federalist deference to state sovereignty runs only to states *qua* states and not to their political subdivisions acting on their own without specific authorization.

The first clear indications of this limitation upon state action immunity came in 1978 in *City of Lafayette v. Louisiana Power and Light Co.,* 435 U.S. 389 (1978). In that case, this Court *rejected* the contention that, quite apart from *Parker,* "Congress never intended to subject local governments to the antitrust laws." 435 U.S. at 394. On the contrary, the plurality opinion states that:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker*'s limitation of the exemption to "official action directed by a state," is consistent with the fact that the States' subdivisions generally have not been treated as equivalents of the States themselves. *In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach."* [435 U.S. at 412-413 (footnote omitted; citations omitted).]

A similar scenario arose in the case of *Community Communications Co., Inc. v. City of Boulder,* 455 U.S. 40 (1982). In that case, a private cable TV operator asserted antitrust objections to the City of Boulder's denial of its request to extend its area of service. Notwithstanding *City of Lafayette,* the city of Boulder asserted *Parker v. Brown* immunity based upon its status as a "home rule" municipality under the Colorado Constitution.

The Court reviewed the *City of Lafayette* opinion and other authority, and held:

> Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see *Parker,* or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette, Orrin W. Fox Co.,* and *Midcal.* [455 U.S. at 52.]

As to the contention that a "home rule" state constitutional provision would constitute adequate delegation of state authority, the *Boulder* opinion responds:

> [P]lainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted,*" since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. . . Thus in respondent's view, Boulder can pursue its course of regulating cable television competition, while another home rule city choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require. [455 U.S. at 55-56.]

In *Town of Hallie v. City of Eau Claire,* 50 L.W. 4418 (1985), a recent case involving an alleged monopoly by a municipality over the provision of sewage treatment services and a tying arrangement between these services and the collection and transportation of waste, this Court, in review of the earlier case law, unequivocally stated:

> Municipalities . . . are not beyond the reach of antitrust laws by virtue of their status because they are not themselves sovereign . . . . Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." [*Id.* at 4419 (Citations omitted.)]

The California Supreme Court in *Birkenfeld v. City of Berkeley,* 17 Cal.3d 129 (1976), has acknowledged "the conceded absence of any state statute authorizing local legislation on the subject." *Birkenfeld,* 17 Cal.3d at 140. The court expressly stated that "California has no state rent control statute." *Id.* at 141. In the area of price regulation, no statutory prohibition of local action is needed to invalidate it where the standard for validity is "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." *Boulder,* 455 U.S. at 52. Moreover, that requirement "is *not* satisfied when the State's position is one of mere *neutrality* respecting the municipal action challenged as anticompetitive." *Boulder,* 455 U.S. at 55 (emphasis added).

In this case, no empowering statute exists from which anticompetitive conduct can foreseeably result. The California Supreme Court acknowledged "the conceded absence of any state statute authorizing local legislation on the subject. *Birkenfeld,* 17 Cal.3d. at 140. Not only is there no contemplation of anticompetitive conduct, but there is no state statute authorizing municipalities to regulate rents in the first instance, from which such legislative contemplation could flow. The inescapable conclusion is that such local price-fixing regulation is illegal and this Court should so hold. Therefore, any municipal ordinance authorizing such anticompetitive regulation, in the absence of "clearly articulated and affirmatively expressed state policy," should be preempted by the Sherman Act.

Moreover, in *Town of Hallie,* this Court also concluded that the requirement of active state supervision "should not be imposed in cases in which the actor is a municipality." *Town of Hallie,* 53 L.W. at 4421 (1985). This Court clarified in a footnote, however, that in situations in which "municipal regulation of a private party is involved, active state supervision must be shown, even where a clearly articulated state policy exists." Id. at 4421 n.10. Therefore, in this case, in which the City of Berkeley is regulating the rents chargeable by private landlords, even if a clearly articulated state policy did exist, the City of Berkeley could not claim state action immunity because no active state supervision of rent control can be shown.

II

THE MODIFIED COMMERCE CLAUSE TEST CREATED BY THE CALIFORNIA SUPREME COURT ERRONEOUSLY LIMITS THE APPLICABILITY OF SHERMAN TO MUNICIPAL REGULATION AND ADDS CONFUSION TO THIS AREA OF THE LAW

In *Lafayette* and *Boulder,* this Court clearly stated that anticompetitive municipal action is shielded from antitrust preemption only in situations in which the action is taken "pursuant to state policy to displace competition with regulation or monopoly public service," *Lafayette,* 435 U.S. at 413, which is both "clearly articulated and affirmatively expressed." *Boulder,* 455 U.S. at 54. In *Lafayette,* this Court unequivocally rejected the argument that deference to local government policy compelled the finding of an implied exclusion from antitrust prohibitions for "actions of municipalities that exist to serve the public weal, . . ." *Lafayette,* 435 U.S. at 403. Justice Brennan, delivering the opinion of the Court, stated:

> If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. [*Lafayette,* 435 U.S. at 408 (footnote omitted).]

In *Town of Hallie,* this Court reiterated that "[m]unicipalities are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie,* (1985) 53 L.W. at 4419.

We are confused, however, by the California Supreme Court's significant departure from this Court's clearly defined test in *Boulder, Lafayette* and *Town of Hallie.* The Court below maintained exactly the opposite position:

> To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate for the motives that underlie local government regulation (citations

> omitted), courts must develop tests that recognize a public welfare "defense" to alleged violation of the antitrust laws by municipalities. [Opinion below, 37 Cal.3d at 673.]

In attempting to create this "public welfare defense," the California Supreme Court rejected the traditional *per se* prohibition of price-fixing, because "[i]n our view, maximum rent price-fixing, implemented by local government, is simply not of the same character as price fixing among private business defendants." Opinion below, 37 Cal.3d at 670. In circumventing existing precedent established by this Court in order to force antitrust policy to give way to the local police power autonomy, the California court candidly admitted that it was motivated by a desire to restore anticompetitive autonomy to cities, stating that "if unbending application of traditional standards would prove too inflexible to accommodate legitimate governmental objectives that motivate municipal regulation, we will not hesitate to cautiously depart from traditional rules." Opinion below, 37 Cal.3d at 664.

In designing this "public welfare defense" by which a municipality can engage in, mandate and authorize conduct, without state authorization, that is anticompetitive in both purpose and effect, the court below created a standard under which the anticompetitive ordinance is deemed not to conflict with the Sherman Act. To withstand a Sherman attack, the ordinance need only comport with what is in essence an amalgam of substantive due process and Commerce Clause negative implications tests.

The admitted purpose of this test which fairly conclusively presumes the supremacy of local policy over national antitrust policy, is to prevent "judicial second-guessing of local decisions to accomplish proper local purposes." Opinion below, 37 Cal.3d at 673. The California court articulated its test in the following manner:

> Adapting the court's commerce clause test to this facial section 1 attack on a municipal rent control ordinance, we conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power,

> and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. [Opinion below, 37 Cal.3d at 675 (footnotes omitted).]

In footnote 27 accompanying the test quoted above, the California court explains that this exemption applies not only to "traditional" or "integral" functions, but rather would immunize "all local action rationally related to the promotion of local health, safety and welfare." *Id.* at n.27. Although the court borrowed elements of "evenhandedness" and "less intrusive means" from this Court's previous Commerce Clause cases, such borrowing was purposefully selective since the court expressly excludes this Court's well-established cost-benefit balancing test:

> We will, however, depart from the United States Supreme Court's commerce clause test is [sic] one significant respect. We will not apply the wide-ranging, essentially standardless cost-benefit analysis employed in the court's recent "balancing" decisions. *See, e.g., MITE Corp., supra,* 457 U.S. 624; *Kassel, supra,* 450 U.S. 662; *Clover Leaf Creamery, supra,* 449 U.S. 456; *see generally,* Eule, *Laying the Dormant Commerce Clause to Rest* (1982) 91 Yale L.J. 425 [criticizing the court's balancing approach, and proposing an alternate standard]: Maltz, *How Much Regulation is too Much—An Examination of Commerce Clause Jurisprudence* (1981) 50 Geo.Wash.L.Rev 47 [same]; Tushnet, *Rethinking the Dormant Commerce Clause* 1979 Wis.L.Rev. 125 [same]. [Opinion Below, 37 Cal.3d at 675.]

Significantly, the California court is borrowing tests from the wrong body of law. The line of authority cited above to circumvent the reach of federal antitrust law deals with the "dormant Commerce Clause," also known as the "negative implications" of the Clause, which remain as a limit to state

action upon interstate commerce even in the absence of preemptive congressional action. *See* Tribe, *American Constitutional Law,* Section 6-2 (Foundation Press, 1978). This case does not involve a situation in which no express congressional action has been taken and the issue becomes whether the "negative implications" of the Commerce Clause allocation of commerce jurisdiction to Congress implicitly forbid state interference, but rather involves the adjudication of a claim of direct preemption of local action by express congressional action pursuant to the Commerce Clause. The question in this case is simply whether a conflict exists between the two schemes, in which case the congressional policy *must* prevail. Professor Tribe aptly described the difference in congressional action:

> So long as Congress acts within an area delegated to it, the preemption of conflicting state or local action—and the validation of congressionally authorized state or local action—flow directly from the substantive source of the congressional action coupled with the supremacy clause of article VI; such cases may pose complex questions of statutory construction but raise no controversial issues of power. Those issues are raised, however, when state power is said to be ousted not because of specific conflict with what Congress has *done* but because of negative implications thought to flow from what Congress *might* have done. Such ouster of state authority because of "dormant" congressional power of course lies at the heart of most commerce clause litigation. [Tribe, *supra,* section 6-23; footnote omitted, emphasis in original.]

Clearly, the California court has misapplied the law established by this Court.

In reality, although the test below is couched in terms of substantive "conflict" between federal and municipal law, the California court, by creating this test, has attempted to overrule this Court's opinions in *Lafayette* and *Boulder* and to uphold the argument, expressly rejected in both those cases, that municipal action in pursuit of local social policy enjoys an implied exclusion from the antitrust laws.

The California Chamber of Commerce is mindful of the plight of local government in fashioning laws to protect the health, safety, and welfare of its residents. The test established in the court below, however, goes much too far in protecting the police power of local governments. On its face, the court's test is not expressly limited to the regulation of rental housing. In fact, the court grants the test broad application in order to "provide a workable standard for judging alleged conflict between municipal ordinances and the federal antitrust laws. Opinion below, 37 Cal.3d at 675. In the name of protecting health, safety, and welfare, the city of Berkeley, under this new test, conceivably could enact ordinances fixing the price of almost any good or service from rental housing to bread, milk, and cheese, in the absence of economic or wartime crisis. In essence, we are concerned that some California municipalities may attempt to regulate all aspects of commerce within its city boundaries. Although this may not pose a threat in many states across the nation, in California, especially in cities such as Berkeley, the threat is very real. In sum, the California test is ill-founded and overly broad. We urge this court to step in and set the record straight.

On the other side of the coin, California businessmen are often the beneficiaries of apparently anticompetitive municipal regulation. Because of the confusion created by this test that is diametrically opposed to the precedent established by this Court in *Lafayette* and *Boulder,* however, California businesses are reluctant to jump in and participate with California municipalities in anticompetitive conduct authorized only by municipal ordinances and not by clearly articulated state policies. It is not inconceivable for a Chamber member to be in a situation in which he has expended millions of dollars to enter an anticompetitive venture, authorized solely by a municipal ordinance, only to find himself subject to an injunction and treble damages under the Sherman Act because he relied on erroneous law established by the California Supreme Court. Businessmen in California need to have the law clarified so we can make intelligent business decisions in this regard. If we know that there is a bear trap out in the woods, we can learn to walk around it. If, however, we are blindfolded by this

California court test as we walk out the door, we eventually will get caught in the trap.

Because this California court test will become binding precedent on all lower courts across the nation if this Court summarily dismisses this case, *Hicks v. Miranda,* 422 U.S 332, we urge this Court to fully consider this important case on the merits.

CONCLUSION

The conduct contemplated by the city of Berkeley's rent control ordinance constitutes price-fixing in its purest form. Price-fixing conflicts with the Sherman Act and is therefore preempted under the Supremacy Clause. Moreover, because the city of Berkeley is not acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with municipal regulation, the city cannot be afforded state action immunity under the *Parker* doctrine. The rent control ordinance, therefore, is not saved from Sherman preemption. In addition, a sufficient nexus exists between the challenged rent control ordinance and interstate commerce to invoke federal jurisdiction under the Sherman Act.

Finally, the test established by the California Supreme Court to determine the validity of an anticompetitive municipal ordinance that conflicts with Sherman departs significantly from the precedent firmly established by this Court in *Lafayette, Boulder,* and *Town of Hallie,* and should therefore be overturned by this Court. In light of the aforementioned considerations, the California Chamber of Commerce respectfully urges this Court to note probable jurisdiction and consider this important case on the merits.

Respectfully submitted,

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